IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 34127

EDGAR VASQUEZ HERNANDEZ,	)	**2009 Unpublished Opinion No. 423**
	)	
Petitioner-Appellant,	)	**Filed: April 13, 2009**
	)	
v.	)	**Stephen W. Kenyon, Clerk**
	)	
STATE OF IDAHO,	)	**THIS IS AN UNPUBLISHED**
	)	**OPINION AND SHALL NOT**
Respondent.	)	**BE CITED AS AUTHORITY**
	)	

Appeal from the District Court of the Third Judicial District, State of Idaho, Canyon County. Hon. Juneal C. Kerrick, District Judge.

Order denying petition for post-conviction relief, affirmed.

Molly J. Huskey, State Appellate Public Defender; Jason C. Pintler, Deputy Appellate Public Defender, Boise, for appellant.

Hon. Lawrence G. Wasden, Attorney General; Jessica M. Lorello, Deputy Attorney General, Boise, for respondent.

GUTIERREZ, Judge

Edgar Vasquez Hernandez appeals from the district court's order denying his petition for post-conviction relief. We affirm.

I.
BACKGROUND

In June, 2003, Edgar Vasquez Hernandez entered guilty pleas to two counts of vehicular manslaughter, I.C. § 18-4006(3)(a), (b), and one count of aggravated driving under the influence of alcohol, I.C. § 18-8006. These charges resulted from a car crash when Hernandez was traveling the wrong direction on the interstate. Two of the occupants of the other vehicle were killed and the third occupant was severely injured. Hernandez and the state did not enter into a plea agreement. Hernandez was sentenced to serve two consecutive unified sentences of fifteen years with five years determinate, for two counts of vehicular manslaughter and an additional consecutive unified sentence of ten years with three years determinate, for aggravated driving

under the influence. Hernandez did not file a direct appeal from his conviction; however he did file a motion for reduction of sentence pursuant to Idaho Criminal Rule 35. The district court denied this motion. Hernandez subsequently filed a *pro se* petition for post-conviction relief, along with an "Affidavit of Facts," and the district court appointed counsel to represent him. Hernandez asserted five claims of ineffective assistance of counsel, plus a claim that his guilty plea was involuntary. The state filed an answer and motion for summary disposition and an amended motion for summary disposition. Transcripts of the change of plea and sentencing hearings were produced. After a hearing, the district court summarily dismissed all but one of Hernandez's claims, and held an evidentiary hearing. The testimony presented at the evidentiary hearing demonstrated further support for the court's summary dismissal of the other claims, which the district court included in its written order denying Hernandez's entire petition for post-conviction relief. This appeal follows.

II.
DISCUSSION

Hernandez challenges the summary dismissal of only three of his claims; two for ineffective assistance of counsel and one that his guilty plea was involuntary. He asserts that summary dismissal of these three claims was improper because the state's answer and motion for summary disposition provided insufficient notice of the grounds for dismissal. He also asserts that the district court erred by summarily dismissing the three claims because he raised issues of material fact that necessitated an evidentiary hearing.

An application for post-conviction relief initiates a proceeding that is civil in nature. *State v. Bearshield*, 104 Idaho 676, 678, 662 P.2d 548, 550 (1983); *Clark v. State*, 92 Idaho 827, 830, 452 P.2d 54, 57 (1969); *Murray v. State*, 121 Idaho 918, 921, 828 P.2d 1323, 1326 (Ct. App. 1992). As with a plaintiff in a civil action, the applicant must prove by a preponderance of evidence the allegations upon which the request for post-conviction relief is based. I.C. § 19-4907; *Russell v. State*, 118 Idaho 65, 67, 794 P.2d 654, 656 (Ct. App. 1990). An application for post-conviction relief differs from a complaint in an ordinary civil action. An application must contain much more than "a short and plain statement of the claim" that would suffice for a complaint under I.R.C.P. 8(a)(1). Rather, an application for post-conviction relief must be verified with respect to facts within the personal knowledge of the applicant, and affidavits, records or other evidence supporting its allegations must be attached, or the application must

state why such supporting evidence is not included with the application. I.C. § 19-4903. In other words, the application must present or be accompanied by admissible evidence supporting its allegations, or the application will be subject to dismissal.

Idaho Code Section 19-4906 authorizes summary disposition of an application for post-conviction relief, either pursuant to motion of a party or upon the court's own initiative. Summary dismissal of an application pursuant to I.C. § 19-4906 is the procedural equivalent of summary judgment under I.R.C.P. 56. Summary dismissal is permissible only when the applicant's evidence has raised no genuine issue of material fact which, if resolved in the applicant's favor, would entitle the applicant to the requested relief. If such a factual issue is presented, an evidentiary hearing must be conducted. *Gonzales v. State*, 120 Idaho 759, 763, 819 P.2d 1159, 1163 (Ct. App. 1991); *Hoover v. State*, 114 Idaho 145, 146, 754 P.2d 458, 459 (Ct. App. 1988); *Ramirez v. State*, 113 Idaho 87, 89, 741 P.2d 374, 376 (Ct. App. 1987). Summary dismissal of an application for post-conviction relief may be appropriate, however, even where the state does not controvert the applicant's evidence because the court is not required to accept either the applicant's mere conclusory allegations, unsupported by admissible evidence, or the applicant's conclusions of law. *Roman v. State*, 125 Idaho 644, 647, 873 P.2d 898, 901 (Ct. App. 1994); *Baruth v. Gardner*, 110 Idaho 156, 159, 715 P.2d 369, 372 (Ct. App. 1986). On review of a dismissal of a post-conviction relief application without an evidentiary hearing, we determine whether a genuine issue of fact exists based on the pleadings, depositions, and admissions together with any affidavits on file; moreover, the court liberally construes the facts and reasonable inferences in favor of the nonmoving party. *Ricca v. State*, 124 Idaho 894, 896, 865 P.2d 985, 987 (Ct. App. 1993).

A. Sufficiency of the State's Notice of Summary Disposition

Hernandez first asserts that summary dismissal of his claims was improper because the state's motion to dismiss provided insufficient notice of the grounds for dismissal. The state argues that Hernandez waived any objections to the sufficiency of the state's motion because counsel, at the hearing on the motion, agreed with the basis for dismissal.

The Idaho Supreme Court recently held that a post-conviction petitioner can not challenge the sufficiency of the state's motion for summary dismissal for the first time on appeal. *DeRushé v. State*, 146 Idaho 599, 200 P.3d 1148 (2009). Notice is sufficient as long as the other party cannot assert surprise or prejudice. *Id.* However, unless a petitioner challenges the

sufficiency of the state's motion before the district court, it will not be considered on appeal. *Id.; see also, Ferrier v. State*, 135 Idaho 797, 799, 25 P.3d 110, 112 (2001); *McCoy v. State*, 129 Idaho 70, 74, 921 P.2d 1194, 1198 (1996). Even though Hernandez was represented by counsel below, this issue was not raised either at the hearing on the state's motion or the evidentiary hearing. Therefore we will not consider Hernandez's claim that the state's motion for summary dismissal did not state its grounds with sufficient particularity.[1]

B. There Were No Material Issues of Fact

Hernandez next argues that the district court erred by summarily dismissing three of his claims because he raised issues of material fact which necessitated an evidentiary hearing. Those claims are that (1) his trial attorney was ineffective for advising him that his sentences would run concurrently, (2) trial counsel was ineffective for coercing his guilty plea by telling him that if he did not accept the plea bargain counsel would not be able to help him, and finally, (3) his guilty plea was not voluntary because he did not understand the proceedings due to a language barrier.

A claim of ineffective assistance of counsel may properly be brought under the post-conviction procedure act. *Murray*, 121 Idaho at 924-25, 828 P.2d at 1329-30. To prevail on an ineffective assistance of counsel claim, the defendant must show that the attorney's performance was deficient and that the defendant was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Hassett v. State*, 127 Idaho 313, 316, 900 P.2d 221, 224 (Ct. App. 1995). To establish a deficiency, the applicant has the burden of showing that the attorney's representation fell below an objective standard of reasonableness. *Aragon v. State*, 114 Idaho 758, 760, 760 P.2d 1174, 1176 (1988). Where, as here, the defendant was convicted upon a guilty plea, to satisfy the prejudice element, the claimant must show that there is a reasonable probability that, but for counsel's errors, he or she would not have pled guilty and would have insisted on going to trial. *Plant v. State*, 143 Idaho 758, 762, 152 P.3d 629, 633 (Ct. App. 2006). This Court has long adhered to the proposition that tactical or strategic decisions of trial counsel will not be second-guessed on appeal unless those decisions are based on inadequate preparation,

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[1] Hernandez notes in his brief on appeal that the summary dismissal of his petition was pursuant to I.C. § 19-4906(c) because the state moved for summary disposition, and because the district court did not provide twenty days for his response as required under I.C. § 19-4906(b). However, Hernandez does not argue that summary dismissal was improper because the district court dismissed the petition on grounds other than those raised by the state.

ignorance of relevant law or other shortcomings capable of objective evaluation. *Howard v. State*, 126 Idaho 231, 233, 880 P.2d 261, 263 (Ct. App. 1994).

Hernandez's first claim is that his trial attorney was ineffective for telling him that the sentences would run concurrently, by advising him to take the plea bargain and by representing that the state had agreed to recommend this to the court. At the change of plea hearing, defense counsel and the state both made clear that there were no agreements as to the guilty pleas or sentencing recommendations. The district court also emphasized that it was free to impose any sentence within the maximum, and would not be bound by the recommendations of either party. Hernandez indicated on the record that he understood the maximum possible sentences and that the district court could impose those sentences. Furthermore, trial counsel testified at the evidentiary hearing and denied telling Hernandez that the sentences would run concurrently. Nevertheless, Hernandez now asserts that he believed he would receive concurrent sentences. We are not required to accept Hernandez's mere conclusory allegations, unsupported by admissible evidence. *Roman*, 125 Idaho at 647, 873 P.2d at 901; *Baruth*, 110 Idaho at 159, 715 P.2d at 372. Summary dismissal is appropriate where the record from the criminal action or other evidence conclusively disproves essential elements of the applicant's claims. *See Follinus v. State*, 127 Idaho 897, 900, 908 P.2d 590, 593 (Ct. App. 1995). Hernandez did not raise any genuine issues of material fact with regard to the allegation that counsel misinformed Hernandez regarding concurrent sentences, and therefore the district court did not err by summarily dismissing this claim. *Mata v. State*, 124 Idaho 588, 592, 861 P.2d 1253, 1257 (Ct. App. 1993).

Hernandez's second claim of ineffective assistance of counsel on appeal is that his trial attorney coerced him into pleading guilty by telling him that if he refused the plea bargain, defense counsel "could not help him." We have already determined that there was no plea agreement for Hernandez to accept or reject. Furthermore, at the change of plea hearing, Hernandez informed the district court that he was not being forced to enter a guilty plea and that no promises or inducements were made to him in exchange for his guilty plea. Once again, the record disproves Hernandez's claim; he has presented no issues of material fact showing his attorney coerced him into pleading guilty. Accordingly, the district court did not err by summarily dismissing this claim.

Hernandez's final claim on appeal is that his guilty plea was not voluntary because he did not understand the proceedings which were conducted in English. Hernandez's primary

language is Spanish. Prior to accepting a guilty plea, a trial court must satisfy itself that the plea is offered knowingly, voluntarily, and intelligently. *Boykin v. Alabama*, 395 U.S. 238 (1969); *State v. Colyer*, 98 Idaho 32, 34, 557 P.2d 626, 628 (1976); *Retamoza v. State*, 125 Idaho 792, 794, 874 P.2d 603, 605 (Ct. App. 1994). Whether a plea is voluntary and understood entails inquiry into three areas: (1) whether the defendant's plea was voluntary in the sense that he understood the nature of the charges and was not coerced; (2) whether the defendant knowingly and intelligently waived his rights to a jury trial, to confront his accusers, and to refrain from incriminating himself; and (3) whether the defendant understood the consequences of pleading guilty. *Colyer*, 98 Idaho at 34, 557 P.2d at 628. It is clear that the voluntariness of a guilty plea can be determined by considering all of the relevant surrounding circumstances contained in the record. *Schneckloth v. Bustamonte*, 412 U.S. 218, 238 n.25 (1973); *McMann v. Richardson*, 397 U.S. 759 (1970); *Brady v. United States*, 397 U.S. 742 (1970).

Hernandez engaged in a colloquy with the district court at the change of plea hearing which covered the nature of the charges, whether he was being forced in any way into pleading guilty, all of the rights he was giving up by entering a guilty plea, the maximum sentences that could be imposed, and the nature of the proceedings. Hernandez was assisted at all times by a court-appointed interpreter. Hernandez stated that he understood all of the court's questions and all of his conversations with defense counsel "perfectly." Hernandez was repeatedly instructed to notify the court if he did not understand something, yet he did not do so. The district court found Hernandez to be expressive during all of the proceedings and capable of explaining himself through the interpreter. The record clearly refutes Hernandez's claim that he did not understand the proceedings. *See Retamoza*, 125 Idaho at 795, 874 P.2d at 606 (concluding that Retamoza understood the proceedings with the aid of an interpreter--his responses were appropriate and he engaged in an intelligent colloquy with the court); *State v. Munoz*, 118 Idaho 742, 745, 800 P.2d 138, 141 (Ct. App. 1990) (finding Munoz understood English well enough to comprehend the proceedings; Munoz answered all questions in English and testified he fully understood his attorney's and the court's questions); *cf. State v. Carrasco*, 117 Idaho 295, 299-301, 787 P.2d 281, 285-87 (1990) (holding guilty plea was not knowing, voluntary, and intelligent because Carrasco was not provided an interpreter at his first arraignment even though he spoke no English and the rights he gave up by pleading guilty were never discussed with him with the aid of an interpreter). Hernandez did not raise any issues of material fact indicating that

a language barrier impaired his understanding of the proceedings causing his plea to be invalid. Therefore, the district court did not err by summarily dismissing this claim.

III.

CONCLUSION

Hernandez cannot raise as an issue that the state's motion for summary dismissal provided insufficient notice of the grounds for dismissal for the first time on appeal. In order to challenge the sufficiency of the state's notice, a petitioner must raise the issue before the district court. The district court did not err by summarily dismissing Hernandez's claims. He failed to raise any genuine issues of material fact, as each claim was disproven by the record. Accordingly, the order of the district court denying Hernandez's petition for post-conviction relief is affirmed.

Chief Judge LANSING and Judge PERRY **CONCUR**.